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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

KEISER LAKE DRAINAGE DISTRICT OF JEFFERSON, LINCOLN AND DESHA COUNTIES, ARKANSAS ..... *Petitioner*

v. No. 595

A. J. JOHNSON ..... *Respondent*

BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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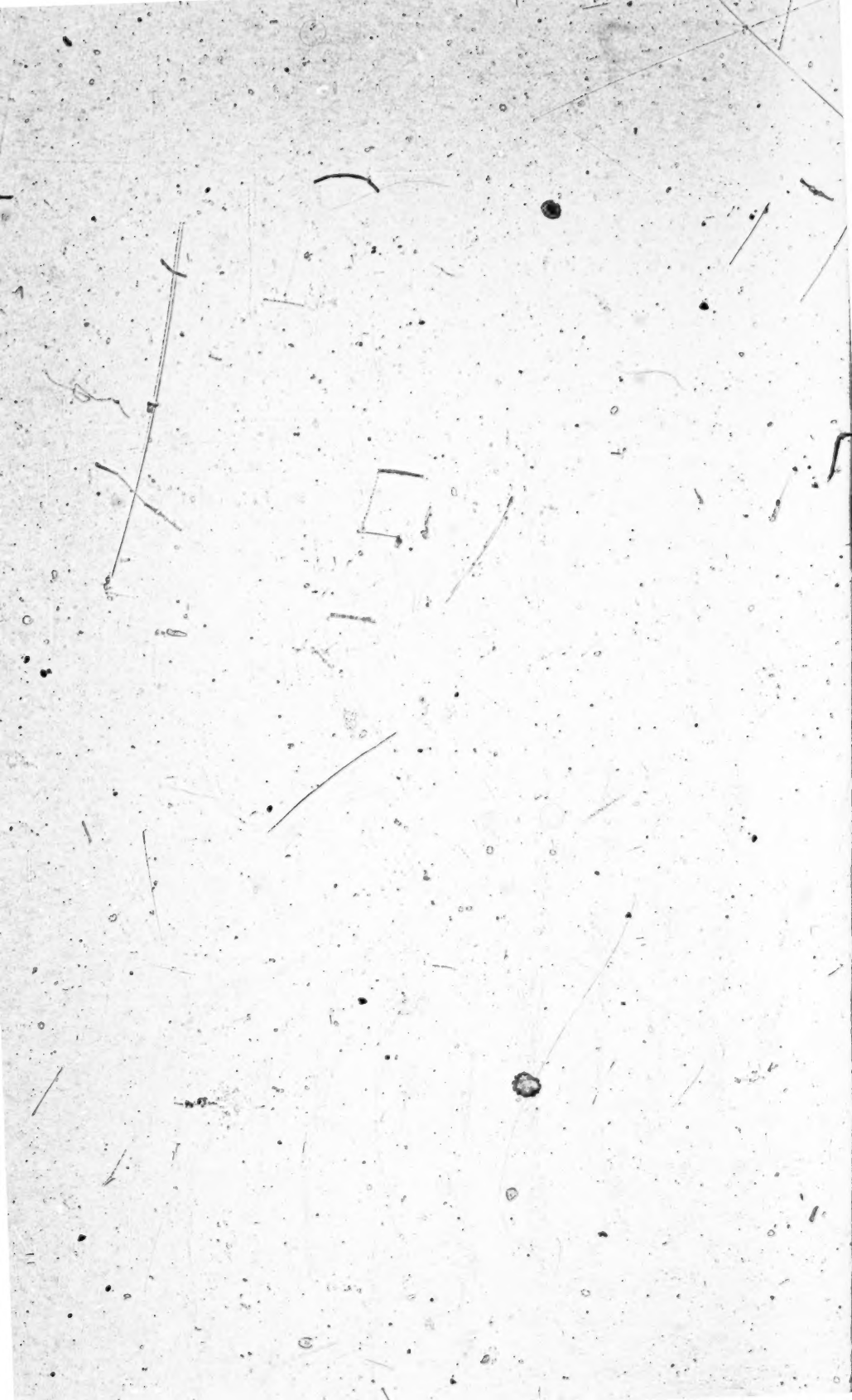

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BRIEF FOR RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

STATEMENT OF THE CASE

None of the federal questions stated in the petition is involved in this case.

In Arkansas delinquent taxes levied upon benefits assessed upon land to defray the cost of a public improvement are collected by the commissioners of the improvement district by a suit in the state chancery court having jurisdiction of the district. The suit is by the district against the delinquent landowners for a foreclosure of the lien of the taxes. No other court has jurisdiction of the suit and no creditor or bondholder of the district is a proper party.

Pope's Digest of the Statutes of Arkansas, section 4482, printed in the appendix, page 15.

The duty of the commissioners of the district to levy and collect taxes may be enforced by mandamus or a mandatory injunction in equity at the instance of any landowner, bondholder or creditor of the district.

Act 46, page 126, Acts of Arkansas, 1933, printed in the appendix, page 15.

The only question in this case and the only question decided by the Supreme Court of Arkansas in its opinion sought to be reviewed here is whether, in a suit to collect alleged delinquent taxes brought by an improvement district in the state chancery court in obedience to a mandatory injunction issued by a federal district court on the complaint of a creditor of the district, a taxpayer may defend on grounds purely personal to himself; in this particular instance, payment in full of the tax sued for. Counsel for petitioner contends that the taxpayer, in the circumstances stated, may not make such a defense and professes to find in the decision of the Supreme Court of Arkansas, which permitted and sustained such a defense, a denial of full faith and credit to the judgment of the federal district court commanding the bringing of the suit by the district in the state chancery court; and also the taking without due process, of the property, not of the petitioner here, but of others not parties to this suit, namely, the creditors of the district which secured the order of the federal court commanding the institution of the suit in the state court.

The defense of full payment offered by the taxpayer was supported by a final decree of the state chancery court, sustaining that defense, entered years before the institution of the present suit. This decree, rendered by

the only court having jurisdiction of the parties and of the question in litigation, in a suit between the same district and the same taxpayer involving the same tax sued for here, was pleaded by the taxpayer as *res judicata* in the present suit. Nothing is said in the petition about the full faith and credit to which this state court decree is entitled, nor about the taking of the taxpayer's property without due process if, as petitioner contends here, he may not be permitted to defend a suit to recover a tax on the ground that the tax has been paid. Nor, for that matter, does it appear from the petition why it was either necessary or proper for the federal court to order the suit for delinquent taxes brought in the state court if the taxpayers sued were not entitled to defend.

The material facts are as follows:

On December 22, 1936 (Rec. 22) in the suit of State Bank & Trust Company of Wellston, Missouri, plaintiff, v. Kersh Lake Drainage District et al., defendants, the United States District Court for the Eastern District of Arkansas entered its decree (Rec. 17-22) for a mandatory injunction ordering the commissioners of the defendant district to institute suits "for the collection of all delinquent taxes of said district." (Rec. 22). Nothing more was decided. This decree was entered upon a complaint filed by the State Bank & Trust Company of Wellston against the defendant district (Rec. 26-28), alleging that the bank was the holder of an unpaid judgment against the district and praying that the district be compelled under Act No. 46, Acts of Arkansas, 1933, to proceed with the collection of delinquent taxes for the payment of the judgment (Rec. 28).

Counsel for the State Bank & Trust Company of Wellston in this case (Rec. 28) appears as counsel for the petitioner district here.

In obedience to the order of the federal court the drainage district brought this suit in the proper state chancery court against the lands alleged to be delinquent in the payment of taxes (Rec. 1-3) proceeding under section 4482 of Pope's Digest of the laws of the State of Arkansas. In this suit respondent A. J. Johnson answered (Rec. 3) alleging the payment in full of all taxes lawfully levied upon his lands by the district (Rec. 5) and pleading, as *res judicata* of the issue tendered, a decree made in October 1931, by the state chancery court having jurisdiction of such suits, wherein it was determined that the said Johnson had paid to the district all assessments and taxes for which he was legally liable. In this decree of the state chancery court (Rec. 6-8) the court found that respondent Johnson had fully paid and satisfied all benefits and taxes legally collectible from his land by the district (Rec. 7); that the district was attempting to collect further taxes (Rec. 7) and enjoined the district from extending further taxes against said Johnson's lands. Respondent Johnson also pleaded on behalf of other landowners a decree of the state chancery court entered on the 15th day of June, 1932, in which it was found that a number of landowners in the district had likewise paid all taxes and benefits for which they were liable to the district and which enjoined further suits by the district to collect more taxes from these landowners. (Rec. 8-9). On May 29, 1939, the Supreme Court of Arkansas sustained respondent Johnson's defense and his right to make it in the suit brought by the district in obedience to the mandatory injunction of the federal court.

The opinion of the Supreme Court of Arkansas appears in the record at pages 47 to 56. In the opinion the court said:

> "Appellants (respondents here) are not attempting to set up a class defense or one that is common to all the landowners in the district; they are asserting a defense which is peculiar to themselves alone, based on the decrees of the state court which perpetually enjoin the district from collecting any more taxes on these lands. We hold that the decrees are *res judicata*, and we do not think it material in the present case whether the decrees of the state court were right or wrong, there being no allegation of fraud or want of jurisdiction. No appeals were taken from them. The Supreme Court of the United States in *Jeter* v. *Hewitt*, 22 How. 352, said: '*Res judicata* renders white that which is black, and straight that which is crooked. *Facit excurvo rectum, ex albo nigrum.*' The decrees in these suits rendered in 1931 and 1932, *supra*, could only have been set aside on appeal or by direct action to annul them on the ground of fraud, and as we have said no appeals (fol. 136) were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record."

BRIEF

I

The Decision of the Supreme Court of Arkansas Does Not Deny Full Faith and Credit to the Judgment of the Federal Court Nor Prevent Its Enforcement.

In the suit in the federal court against the district by the State Bank & Trust Company of Wellston for a judgment for the amount of delinquent certificates of the district held by the bank the district represented its taxpayers as a class. The taxpayers were bound by the judgment of the federal court in favor of the bank. No taxpayer could thereafter call the judgment in question in another court and none has.

In the suit in the federal court between the bank and the district for the mandatory injunction in aid of the bank's judgment, the district again represented its taxpayers as a class and the taxpayers cannot and do not in the present case question the validity of the federal court's order directing the district to bring suit for the collection of delinquent taxes.

But the district did not, in either suit in the federal court, represent its taxpayers as individuals, with respect to rights peculiar and personal to each individual taxpayer and adverse to the rights of the district.

The federal court in the suit last mentioned had jurisdition to compel the district on the complaint of the bank to proceed with suits in the state court to collect the delinquent taxes owing to the district by the taxpayers as a class. It did not have and could not have jurisdiction of a

controversy between an Arkansas improvement district and a resident taxpayer of the district as to the amount of taxes delinquent and owing to the district by the taxpayer. The federal court did not attempt to exercise jurisdiction of such a controversy as the one last stated, which is the controversy involved here. All the federal court did was to order the district commissioners to bring a suit "for the collection of all delinquent taxes of said district" in the only court having jurisdiction of such a suit. All that it was necessary or proper for the federal court to decide was that there were delinquent taxes owing to the district which the plaintiff judgment holder was entitled to have collected and applied on its judgment and that is all the court decided.

The taxpayers in the district, as individuals having individual rights as against the district, were not parties to the suit in the federal court and could not have been parties in their individual capacities.

Normandy Beach Development Company v. *United States*, 69 Fed. (2nd) 105, 106.

Ocean Beach Heights v. *Brown-Crummer Company*, 302 U. S. 614; 58 Sup. Ct. 385.

Rork v. *Smith*, 12 N. W. (Wis.) 408.

Each taxpayer, however, as an individual having, with respect to taxes claimed against him by the district, rights adverse to the district was entitled to have his day in court upon the question not only of the validity of the tax assessed against him individually but also upon the question of the amount of any valid tax owing by him to the district. The very purpose of the order of the federal court was to present to a court of competent jurisdiction all questions of this character which might arise between the district and

its taxpayers. This was pointed out in the opinion of the Supreme Court of Arkansas as follows:

> "Each taxpayer was entitled to be heard not only upon the validity of the tax levied but also upon the amount of the tax. The mere fact alone that the federal court directed the appellee district to bring the present suit in the state court was a recognition by the federal court of the power of the state court to decide the issues involved." (Rec. 53).

The only power that the federal court had in the suit in which the mandatory injunction was awarded was the power to compel the district to proceed with the collection of delinquent taxes. If either the benefits which could be legally assessed or the taxes which could be lawfully levied on the benefits assessed were insufficient in amount to discharge the judgment held by the bank against the district, the federal court was wholly without power to increase either; or to set aside past judgments of a state court of equal dignity entered in suits between the district and an individual taxpayer determining the issues raised on the amount and legality of an individual assessment in favor of the taxpayer. Needless to say the federal court did not attempt to exercise such jurisdiction and the opinion of the Arkansas Supreme Court in this case sustaining the right of the individual taxpayer to defend the suit brought against him by the district in obedience to the order of the federal court does not deny to either judgment of the federal court the full faith and credit to which it is entitled.

In awarding a mandamus or a mandatory injunction in aid of its judgment a federal court neither creates new rights nor confers new powers. All it does is to bring existing powers into operation.

United States v. *County of Macon*, 99 U. S. 581, 591 and 592.

When an existing power is thus brought into operation the party against whom the power is caused to move has the absolute right to defend against any attempted excessive, illegal or arbitrary exercise of it.

Rees v. *City of Watertown*, 86 U. S. 107, 122.

State of Arkansas v. *St. Louis-San Francisco Railway Company*, 269 U. S. 172; 46 Sup. Ct. 66, 67.

Chandler, Receiver, v. *Peketz*, 297 U. S. 609; 56 Sup. Ct. 602, 603 and 604.

In the case last cited, which is relied on by petitioner, a federal court entered a judgment ordering an assessment against stockholders of a corporation in receivership. A suit was brought by the receiver on this judgment in a state court to collect the assessment. This court held that the judgment of the federal court was not subject to collateral attack by the stockholder in the suit in the state court, but it was careful to point out that in defense of the suit the stockholder was not precluded from asserting any defense personal to himself, such as that he was not a stockholder or had a claim against the corporation which he was entitled to set-off against the assessment or that the amount of the assessment levied against him pursuant to the federal court order was not correct.

In the present case respondent does not question the validity nor the effect of any judgment entered by the federal court but, when sued by the district in obedience to the order of the federal court for a tax alleged to be owing to the district, respondent defends the suit by proving that the tax sued for is not owing and by showing that in a former suit

against him for the same tax the issue has been adjudicated in his favor by a court of competent jurisdiction.

II

The Decision of the Supreme Court of Arkansas Does Not Take the Property of Judgment Creditors of the District Without Due Process.

Counsel for petitioner argues that the decision of the Supreme Court of Arkansas deprives the holders of judgments against the district of their property without due process of law. But no holder of a judgment against the district is a party to this suit. And such a judgment holder might well complain of a denial of due process if his rights were determined in this suit to which he is not a party. Importance is attached to the fact that judgment creditors were not parties to the suit between the district and respondent in the state chancery court in 1931, while none is seen in the fact that no judgment creditor is a party here. The absence of judgment creditors from the proceeding in the state court does not affect the validity of the judgment of that court as between the petitioner district and the respondent taxpayer. It is the validity of the judgment as it affects these parties that is involved in this proceeding.

In Arkansas taxes levied on benefits in improvement districts are limited by the amount of the benefits. Taxation without benefits, or beyond benefits, is confiscation prohibited by the state and federal constitutions.

Alexander v. *Board of Directors Crawford County Levee District*, 97 Ark. 322, 330.
Cribbs v. *Benedict*, 64 Ark. 561.

Under the Arkansas statute creating the petitioner district neither the bondholders nor judgment creditors of the district are proper parties in a suit to collect delinquent taxes. The statute providing for that proceeding requires that the suit be brought by the district. (See statute printed in appendix). The purchaser of the securities of an improvement district is charged with the knowledge of the limits imposed by law upon taxation by the district and of the method provided by law for the collection of taxes by the district. The decree of the federal court awarding the mandatory injunction on the complaint of a judgment creditor of the district shows that the district (Rec. 21) defaulted upon the principal of its bonds in the year 1929. It is certainly not too much to assume that the holders of the district's securities were aware of this default. With this knowledge, it taxes credulity to assume that they did not keep in touch with the proceedings of the district for the collection of taxes upon which the payment of their securities depended. There is nothing in this record to show that they were not advised of the suits.

Nor is it important, if true, that the decrees of the chancery court pleaded as *res judicata* were erroneous. See the opinion in *Chicot County Drainage District* v. *The Baxter State Bank*, decided by this court January 2, 1940. In these state cases the taxpayers contended that they were not liable for further assessment since they had paid the full amount of the benefit then assessed against their property. At the time the cases were tried the Supreme Court of Arkansas had never passed upon the application of the interest statutes of 1913 and 1919 to districts organized prior to the passage of these statutes, petitioner being one of these. Moreover, the court has never yet decided the precise ques-

tion, as pointed out by the Circuit Court of Appeals in its opinion affirming the district court in the mandatory injunction case.

> *Kersh Lake Drainage District* v. *State Bank & Trust Company of Wellston, Missouri*, 92 Fed. (2nd) 783, 786.

To that extent the question as to whether or not respondents were liable for interest is still an open question in the State of Arkansas.

III

The Record Does Not Show Collusion in the Decrees of the State Chancery Court of 1931 *and* 1932. *Nor Does the Record Show that If the Decision Sought to be Reviewed is Sustained the Judgment Holders Will not be Able to Collect Their Judgments against the District.*

In its opinion the Supreme Court of Arkansas said of the decrees in the state chancery court adjudging that respondent had paid all taxes that could be legally levied upon his property:

> "The decrees of these suits rendered in 1931 and 1932 could only have been set aside on appeal or by direct action to annul them on the ground of fraud and as we have said, no appeals were taken, and no fraud on the court in which the decrees were rendered, is reflected by this record."

In this case there is neither allegation in the pleading nor evidence in the record suggesting collusion in the decrees in the state chancery court, nor is there allegation or proof that the holders of judgments obtained in the federal court will not be able to collect their judgments if the de-

cision of the Supreme Court of Arkansas is sustained. Both arguments are advanced in this case, not by any judgment creditor of the district but in the name of the district itself, which was a party to collusion in the state court if any there was. The charge of collusion, like that of want of due process, is made by counsel for petitioner not on behalf of petitioner but for a judgment creditor not a party to the suit. The argument is gratutiously advanced by petitioner not for itself but on behalf of parties absent from the record.

If any judgment creditor has ground for supporting such a charge the way is open under the statutes of Arkansas, as pointed out by the Supreme Court in its opinion quoted above, to bring an action in the state chancery court to annul the decrees on that ground.

CONCLUSION

It is necessary to remember that the federal court in the proceeding for the mandatory injunction was dealing only with delinquent assessments of the district and with the right of the judgment creditor of the district to compel the collection of these assessments and their application to the payment of the creditor's judgment. The court did not, as said by petitioner, direct the commissioners of the district to levy a tax upon every piece of land in the district regardless of whether it was indebted to the district for delinquent taxes and regardless of whether it was subject to further taxes. Such a judgment, if made by the federal court, would have been void as beyond its power to make. All that the federal court did was to order the district to proceed with the collection of those assessments which it

was entitled to collect under the law. In so far as it dealt with the taxpayers of the district and their assessments it dealt with them as a class. It was not concerned in the proceeding before it with rights personal to the individual taxpayer and adverse to the district. That these rights might be determined in the only court having jurisdiction to determine them, made it necessary for the federal court to direct the district to bring this suit in the state court. The fact that an individual taxpayer or a number of taxpayers asserted rights purely personal to themselves in defense of the suit brought by the district in obedience to the judgment of the federal court does not interfere with the enforcement of the federal court's judgment nor deny it full faith and credit under the constitution nor take the property of anyone without due process.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES T. COLEMAN,

WALTER G. RIDDICK,

For Respondent.

Little Rock, Arkansas.

APPENDIX

Section 4482 of Pope's Digest of the Laws of the State of Arkansas, page 1296.

"All taxes levied under the terms of this act shall be payable between the first Monday in January and the 10th day of April of each year; and if any taxes levied by the county court in pursuance to this act are not paid at maturity, the collector shall not embrace such taxes in the taxes for which he shall sell the lands, but he shall report such delinquencies to the board of commissioners of said district, who shall add to the amount of the tax a penalty of twenty-five per cent; and said board of commissioners shall enforce the collection by chancery proceedings in a court of the county in which the lands are situated having chancery jurisdiction; and said court shall give judgment against said lands, railroads or tramroads for the amount of such taxes, and said penalty of twenty-five per cent and interest on same, from the end of said sixty days allowed for the collection thereof, at the rate of six per cent per annum, and all costs of the procedings. * * * "

Act 46 of 1933, Page 126

An Act to Regulate the Collection of Improvement District Taxes.

Whereas, abuses are prevalent in receiverships of levee, drainage and road districts, in the allowance of excessive fees to counsel for filing suits for receivers, the allowance of excessive fees to receivers, the appointment of unnecessary attorneys for receivers and the allowance of excessive fees to them, all of which imposes an additional financial burden on the landowners of the district, and

Whereas, the collection officers provided by law can collect improvement district taxes more expeditiously and

at less expense than receivers, if they are made to discharge their duties; now, therefore,

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Hereafter all taxes in levee, drainage and road districts shall be collected at the time and in the manner and by the officers specified in the statutes creating them, or under which they were organized, and the duty to promptly extend and collect such taxes may be enforced by a mandamus, or by a mandatory injunction in equity, at the instance of any landowner in the district, the trustee in any deed of trust securing the bonds of the district, the holder of any bond as to which the district has defaulted in the payment of interest or principal, or any other creditor of the district. The remedies herein provided shall be exclusive, and all laws providing for or authorizing the appointment of a receiver for any such district are hereby repealed, and no court shall appoint a receiver to collect levee, drainage or road district taxes.

Approved February 18, 1933.